

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

AUG 13 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re

Amendment of Section 73.202(b)
Table of Allotments,
FM Broadcast Stations, and
Petition to Modify License of
Gresham Communications, Inc.,
Licensee of WPAL-FM,
Walterboro, South Carolina

Docket No. 93-169

RM-8246

To: Chief, Policy and Rules Division

COMMENTS IN OPPOSITION TO PETITION FOR RULEMAKING

Millennium Communications of Charleston, Inc. ("Millennium"), licensee of Station WWVZ-FM, Summerville, South Carolina, by its attorneys and pursuant to Sections 1.415 and 1.420 of the Commission's Rules, hereby submits Comments in response to the Commission's Notice of Proposed Rulemaking released on June 22, 1993, proposing to amend the FM Table of Allotments to delete Channel 265C3 from Walterboro, South Carolina, and add Channel 265C3 to Ridgeville, South Carolina and to modify the license of Station WPAL-FM to specify Ridgeville, South Carolina as its community of license. Gresham Communications, Inc. ("Gresham"), licensee of WPAL-FM, submitted the proposal.

Preliminary Statement

Millennium opposes Gresham's request for reallocation of Channel 265C3 and modification of WPAL-FM's community of license. The reallocation of Channel 265C3 will not further the public interest nor the policy goals of the allotment priorities. As demonstrated

No. of Copies rec'd
List A B C D E

24

below, Gresham's real purpose in abandoning Walterboro in favor of the smaller community of Ridgeville is, as stated by Gresham, to "allow WPAL-FM to serve a greater number of persons while operating non-directionally." In effect, Gresham's real aim is to serve the greener pastures of the Charleston urbanized area and environs. A grant of the petition would be a misapplication of the allotment priorities and a miscarriage of the Commission's rule allowing a station to change its community of license without facing competing applications.

If the reallocation is granted, the Commission will deprive Walterboro, South Carolina of a station that has served the community since 1968. This situation differs significantly from proceedings involving the allocation of a new channel where the only issue is which community is more deserving. In reallocation proceedings, the Commission must also carefully weigh the fact that an existing service will be deleted, and whether the proposed move fits the underlying purpose of the migration rule. The reality of the Commission's choice is whether to deprive Walterboro of its second local FM service and its second fulltime aural service¹ to add yet another signal to the well-served Charleston area.

In Amendment of Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License, 4 FCC Rcd 4870 (1989) (hereinafter "First Order") and *Amendment of Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 5 FCC Rcd 7094 (1990) ("Second Order"), the Commission relaxed the regulations faced by FM stations proposing to change their communities of license. The primary motivation and support for the decisions was the fact that

¹ WPAL-FM is the oldest FM station licensed to Walterboro, as Class A FM station WONO went on the air in December 1991. AM daytimer WRIT-AM, also owned by Gresham, would also remain in Walterboro.

the prior rules and policies prevented a more efficient use of the spectrum because a change in a station's city of license would expose the licensee to a comparative hearing and the possible loss of its station. Because of this potentially draconian result, many upgrades were never realized. *Id.* at 4873. The rules adopted in the *First Order* address this problem by eliminating the threat of a competing application so long as the proposals are mutually exclusive. However, the only upgrade in service proposed by Gresham is to cure a slight short spacing (approximately one mile) which necessitates the use of a directional antenna with minimal suppression. Ridgeville, as the closest community to Charleston which allows fully-spaced facilities, merely serves as a community of convenience by which WPAL-FM may expand its service to the Charleston area.

Gresham claims that its petition meets all of the Commission's criteria set forth in the *Second Order* and is in the public interest. In support of that claim Gresham states that reassignment of Channel 265C3 to Ridgeville would create a first local service in that community, while Walterboro would continue to be served by co-owned WALD and Class A FM station WONO. Gresham further states that reassignment of Channel 265C3 as proposed would allow WPAL-FM to operate non-directionally and to serve "a greater number of persons." *See* Gresham's Petition for Rulemaking at ¶ 6. However, Walterboro is the more deserving community under the Commission's 307(b) analysis. Finally, Gresham's stated purpose of providing 70 dBu coverage to Ridgeville and serving a larger total population may be accomplished without depriving Walterboro of the benefits of its oldest and most entrenched FM service.

**Ridgeville Should Be Denied A
First Local Service Preference**

In the *First Order* the Commission stated that proposals such as that made by Gresham would be examined on a case-by-case basis to determine whether the proposed changes, taken as a whole, would advance the allotment priorities. The Commission clarified that policy in the *Second Order* by stating that it would consider ". . .whether a proposal would result in shifting of service from an underserved rural to a well-served urban area and the public interest consequences of any such change." 5 FCC Rcd at 7096. Where spectrum congestion does not prevent such migration, the Commission announced that it would not allow "blind" application of the first local service preference to justify such a result. To determine whether a rural-urban migration is proposed, the Commission decided to apply the factors set out in *RKO General, Inc. (KFRC)*, 5 FCC Rcd 3222 (1990) ("*RKO General*"). In *RKO General* the Commission considered the following three factors when determining whether to deny a preference for first local service: First, the Commission considers the degree to which the proposed station can provide service to the metropolitan area; second, the Commission considers the relative size of the communities, their proximity, and whether the suburban community is within the Urbanized Area of the city, as determined by the U.S. Bureau of the Census; and third, the Commission considers the interdependence of the suburban community with the metropolitan city, based on a variety of indicia. If, after an analysis of these factors, the Commission deems that allotment to the suburban community would condone an artificial and unwarranted manipulation of the Commission's policies, then the allotment would be considered an additional allotment to the urban area for the purpose of the 307(b) analysis.

Application of the above-referenced factors to the instant proposal shows that no first local service preference is justified. As shown in the attached Engineering Statement, WPAL-FM will provide 1 mv/m service to much of the Charleston metropolitan area and 183,612 individuals (47 percent) in the Charleston Urbanized Area. Moreover, the migration significantly improves WPAL-FM's ability to provide service to the Charleston metropolitan area. The first prong of the test weighs heavily in favor of denying a first local service preference.

The second prong of the test, relative size and proximity of the communities, also weighs in favor of denying the preference. Ridgeville's 1990 census population is 1,625, while the city of Charleston's 1990 census population is 80,414. Thus, Charleston is more than 49 times as large as Ridgeville. As shown in the attached Engineering Statement, Ridgeville is approximately 31 miles from the community of license reference point for Charleston, and is nearly adjacent to the boundary of the Charleston Urbanized Area.

Finally, there is evidence that Ridgeville is interdependent with Charleston. For example, the Charleston *Post and Courier*, a daily newspaper, has a circulation of 1,000 in Ridgeville on weekdays and Sunday; there is no local newspaper published in Ridgeville. Moreover, as demonstrated in the attached Engineering Statement, six stations in the Charleston Urbanized Area provide 1 m/vm service to Ridgeville.² Ridgeville, and Dorchester County in which it is located, are both situated in the Charleston MSA. Given the proximity of the communities and the above evidence, the Commission may conclude that the communities are sufficiently interdependent to justify denial of the first local service preference.

² Only one of those stations provides such service to a portion of Walterboro.

As demonstrated, the proposed station at Ridgeville will provide service to 47 percent of the total population in the Charleston Urbanized Area. The size differential and proximity of the communities indicate that such an allocation would really serve the urbanized area. Given these factors and the further evidence of interdependence, Ridgeville should not receive a 307(b) preference for first local service. Charleston is already served by more than 10 aural services. The addition of WPAL-FM would add little to public interest benefits of that community, while Walterboro would lose its oldest and most encompassing FM allocation. Clearly, the need for third local service to a county seat in a rural county outweighs the need of a metropolitan area for an eleventh local service. The Gresham Petition must be dismissed.

**The Petition Does Not Advance
The Commission's FM Priorities**

Even assuming that Ridgeville is deserving of a first local service preference, application of the Commission's 307(b) analysis clearly shows that Walterboro is the preferred community. The Commission recognized the need for a flexible approach to the allotment priorities when it amended the rules to facilitate changes of a station's community of license. During the rule making proceeding, the Commission specifically pointed out that "the Commission's policy is to apply the allotment criteria in a flexible manner where circumstances warrant." *First Order*, 4 FCC Rcd at 4873, citing *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d at 92. Moreover, in the *Second Order* the Commission affirmed that "[w]e have consistently given little or no weight to claimed first local service preferences if, given the facts and circumstances, the grant of a preference would appear to allow an artificial

or purely technical manipulation of the Commission's 307(b) related policies." *Second Order*, 5 FCC Rcd at 7096.

The FM allotment priorities are designed to further the goals of Section 307(b) of the Communications Act of 1934, as amended, by providing a "fair efficient and equitable distribution of radio service...." *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 89 (1982). This general distribution scheme is "...not intended to be applied in a rigid and mechanical fashion." *Amendment of Section 73.202(b), North Charleston, Eastover and Ravenel, South Carolina*, 51 RR 2d 25, 29 (1982). When these general principles, as interpreted in prior cases, are applied to the instant proposal, Walterboro should be preferred over Ridgeville.

For example, in *Ruarch Associates*, 56 RR 2d 1593 (1984), the Commission found that a community with one existing radio station and a population of 2,627 may prevail over an applicant seeking a first local service in a community with a population of 752. Although first local service holds a priority over second local service, the Commission noted that this presumption may be rebutted. According to the Commission, "[h]istorically, it is not without precedent for the presumption of need to be rebutted by a larger community with an existing local transmission service against a smaller community lacking such a service." *Id.* at 1595 citing *Cherokee Broadcasting Co.*, 17 FCC 2d 121 (1969) (community with population of 2235 and two-daytime only AM stations awarded preference over community with population of 1406 and no local service); *See also Wilmer E. Huffman*, 32 FCC 1, 3, *aff'd*, 32 FCC 1193 (1962) (second local service to Pratt, population 7,523 and county seat, outweighed need of Larned, population 4,447, for first local service).

The Commission applied the principle of *Ruarch* in *Beacon Broadcasting*, 2 FCC Rcd 3469 (1987), *aff'd*, 66 RR 2d 1088 (1989), and declined to award a Section 307(b) preference for first local service to Fairforest, South Carolina, a community with a population of 2,941 situated close to the much larger town of Spartanburg, population 43,968. The competing applicant sought a third local service in Morgantown, North Carolina, a community with a population of 13,763, several times larger than Fairforest. The Commission noted that Morgantown had a larger population than Fairforest, that it was the largest town in the county, and that it was the county seat. Moreover, the Commission observed that Fairforest was of "distinctly lesser importance within its locale" because it was situated so close to the large community of Spartanburg. *Id.* at 3472. Accordingly, the Commission found, as it did in *Ruarch*, that the larger community of Morgantown would be preferred even though the channel would represent its third local service versus a first local service to the smaller community of Fairforest. In sum, even in cases involving a new allocation, the mere claim of first local service does not prevail over the second or third allocation to a larger, more deserving community and area. And, as noted, the claim of a first local service alone should not be determinative when a channel reallocation is involved.

This precedent is clearly applicable to the present situation. Like Morgantown, Walterboro is the largest community in its county and is the county seat. Ridgeville, like Fairforest, is a smaller community close to a larger community; in this case Ridgeville is within the MSA of Charleston and just beyond the Urbanized Area of Charleston and is therefore of distinctly lesser importance within its locale than is Walterboro, county seat of Colleton County. According to the 1990 census, Walterboro's population is 5,070, while Ridgeville has a

population of 1,625; a ratio of more than 3 to 1.³ Based on these facts, Walterboro would benefit by retaining its most encompassing and oldest FM channel and second local, fulltime service more than Ridgeville would profit from a first local, fulltime service.

As the Commission recognized in the *First Order*, the application of the 307(b) priorities must be as flexible in reallocation proceedings as it is in allocation proceedings. The reallocation of Channel 265C3 to Ridgeville will deprive Walterboro of a well-established existing service and is not justified by the addition of yet another signal to the Charleston market.

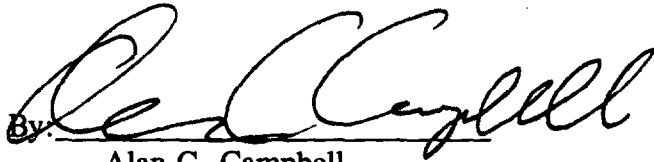
Finally, as demonstrated in the Engineering Statement, WPAL-FM's stated desire to provide 70 dBu coverage and first local service to Ridgeville with an omnidirectional antenna may be accomplished without changing its community of license. As shown in Figure 3 of the Engineering Statement, a substantial area exists which meets all separation requirements and which provides 70 dBu coverage to both Walterboro and Ridgeville. Local service could be mandated for both communities by requesting hyphenation of WPAL-FM's community of license. Millennium suggests that such a move would be the more appropriate course as Walterboro's local service is maintained while Ridgeville gains its first local service.

³ Population figures are taken from the 1990 U.S. Census.

Conclusion

The reallocation of Channel 265C3 to Ridgeville will not further the public interest nor the policy goals of the allotment priorities. In order to achieve a fair efficient and equitable distribution of broadcast service, the Commission must apply the allotment priorities in a flexible manner and, accordingly, deny Gresham's petition to change its community of license to Ridgeville.

Respectfully submitted,
MILLENNIUM COMMUNICATIONS OF
CHARLESTON, INC.

By: 

Alan C. Campbell
Michael G. Jones

Its Attorneys

IRWIN CAMPBELL & CROWE
1320 18th Street, N.W.
Suite 400
Washington, D.C. 20036

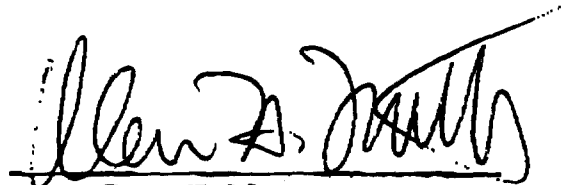
(202) 728-0400

August 13, 1993

DECLARATION OF DEAN H. MUTTER

I, Dean H. Mutter, Executive Vice-President of Radio Station WWWZ-FM, Summerville, South Carolina, hereby state the following under pain and penalty of perjury:

I have reviewed the foregoing "Comments in Opposition to Petition for Rulemaking" and the facts contained therein are true and correct to the best of my knowledge, information and belief.



Dean H. Mutter
Executive Vice-President
Radio Station WWWZ-FM

Date: 8/13/93

EXHIBIT E
ENGINEERING STATEMENT IN
SUPPORT OF COMMENTS RE:
NOTICE OF PROPOSED RULE MAKING
RM-8246 DOCKET NO.93-169

CONTENTS

INTRODUCTION	PAGE 1
PROPOSED RULE MAKING	PAGE 1

FIGURES

LOCATION MAP	FIGURE 1
URBANIZED AREA MAP	FIGURE 2
PREDICTED 1.0 mV/m CONTOURS	FIGURE 3
FM STATIONS LOCATED WITHIN CHARLESTON	
URBANIZED AREA	FIGURE 3A
SITE AREA MAP	FIGURE 4

Prepared by
Lohnes and Culver Washington, DC
August, 1993

EXHIBIT E
ENGINEERING STATEMENT IN
SUPPORT OF COMMENTS RE:
NOTICE OF PROPOSED RULE MAKING
RM-8246 DOCKET NO.93-169

CONTENTS

INTRODUCTION	PAGE 1
PROPOSED RULE MAKING	PAGE 1

FIGURES

LOCATION MAP	FIGURE 1
URBANIZED AREA MAP	FIGURE 2
PREDICTED 1.0 m/Vm CONTOURS	FIGURE 3
FM STATIONS LOCATED WITHIN CHARLESTON	
URBANIZED AREA	FIGURE 3A
SITE AREA MAP	FIGURE 4

Prepared by
Lohnes and Culver Washington, DC
August, 1993

**EXHIBIT E
ENGINEERING STATEMENT IN
SUPPORT OF COMMENTS RE:
NOTICE OF PROPOSED RULE MAKING
RM-8246 DOCKET NO.93-169**

INTRODUCTION

This statement was prepared on behalf of Millennium Communications of Charleston, Inc., license of FM broadcast station WWVZ Summerville, SC. It supplies technical information in support of comments in response to a Notice of Proposed Rule Making (RM-8246) in Docket No.93-169.

PROPOSED RULE MAKING

Gresham Communications, Inc. (Gresham) licensee of FM broadcast station WPAL-FM Walterboro, SC has requested in RM-8246 the reallocation of Channel 265C3 from Walterboro, SC to Ridgeville, SC. Ridgeville is located approximately 24 miles northeast of Walterboro and is approximately 5 miles west of the Charleston, SC Urbanized Area.

Attached as Figure 1 is a location map showing the communities of Walterboro, Ridgeville and Charleston, SC. The Walterboro reference point is 43.3 miles from the Charleston reference point while the Ridgeville reference point is 31.3 miles from the Charleston reference point.

Gresham's petition describes a desired site for the reallocation of Channel 265 to Ridgeville that is approximately 1.7 miles west of Ridgeville in the area that meets the separation

requirements of Section 73.207 of the Commission's Rules. Since the desired site is only 5 miles outside of the Charleston Urbanized Area, a maximum facility Class C3 operation will provide 1.0 mV/m service to a substantial portion of the urbanized area.

For purposes of comparison, the map attached as Figure 2 shows a portion of the 1.0 mV/m contour of the authorized C3 operation of WPAL-FM assigned to Walterboro and a portion of the 1.0 mV/m contour for a proposed maximum C3 operation from the desired Ridgeville site. The contours are shown on the Charleston Urbanized Area map taken from the 1990 Census of Population Bulletin (Population Bulletin) for the state of South Carolina. A population analysis of the urbanized area was performed using the statistical data contained in the Population Bulletin (1990 CPH-2-42). The total population of the urbanized area is 393,956. The urbanized population within the authorized WPAL-FM 1.0 mV/m contour is 56,707, 14.4% of the total and the urbanized population within the proposed Ridgeville 1.0 mV/m contour is 183,612, 47% of the total.

An analysis of the FM broadcast stations assigned to communities within the Charleston Urbanized Area was made to determine how many of those stations provide service to Ridgeville and to Walterboro. There are six FM stations that provide 1.0 mV/m service to Ridgeville while only one provides service to a small percentage of Walterboro. Figure 3 is a map showing the 1.0 mV/m contours of the six stations and their relationships to Ridgeville and Walterboro.

The contours were determined in accordance with the prediction method described in Section 73.313 of the Commission's Rules. The facilities used for the individual stations, in predicting the locations of the contours were taken from FCC database information and are listed on Figure 3A.

The Gresham petition contends that the reallocation of Ch.265C3 from Walterboro to Ridgeville will permit a non-directional operation that will provide a first local service to Ridgeville. The reallocation is necessary since at the desired site identified in the petition the station will be unable to provide City Grade service to Walterboro.

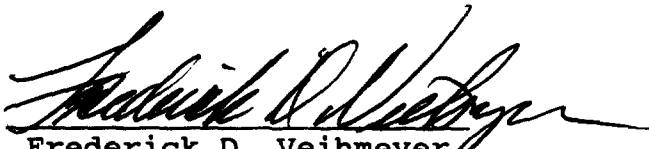
There is, however, a substantial area meeting all separation requirements from which a maximum facility Class C3 non-directional operation can provide 70 dBu City Grade service to both Walterboro and Ridgeville. That area, which is a portion of the area meeting all separation requirements, is shown on Figure 4 with cross-hatched shading. The areas with single cross hatching are limited to providing 70 dBu service to either Ridgeville to the north or Walterboro to the south while the double cross hatched area has the potential to provide 70 dBu service to both Ridgeville and Walterboro. To demonstrate, a site in the center of the area was assumed and the 70 dBu contour of a maximum facility Class C3 operation was established. The contour is shown on Figure 4.

The petitioner states that if 265C3 is reallocated to Ridgeville, WPAL-FM will be able to relocate its transmitter, operate omnidirectionally and provide Ridgeville with its first

local aural transmission service. If this is indeed the sole purpose of the proposal the same goals can be achieved with a change in transmitter location that will enable the station to operate in an omnidirectional mode and provide principal community coverage to both Ridgeville and Walterboro.

Respectfully Submitted,
LOHNES AND CULVER

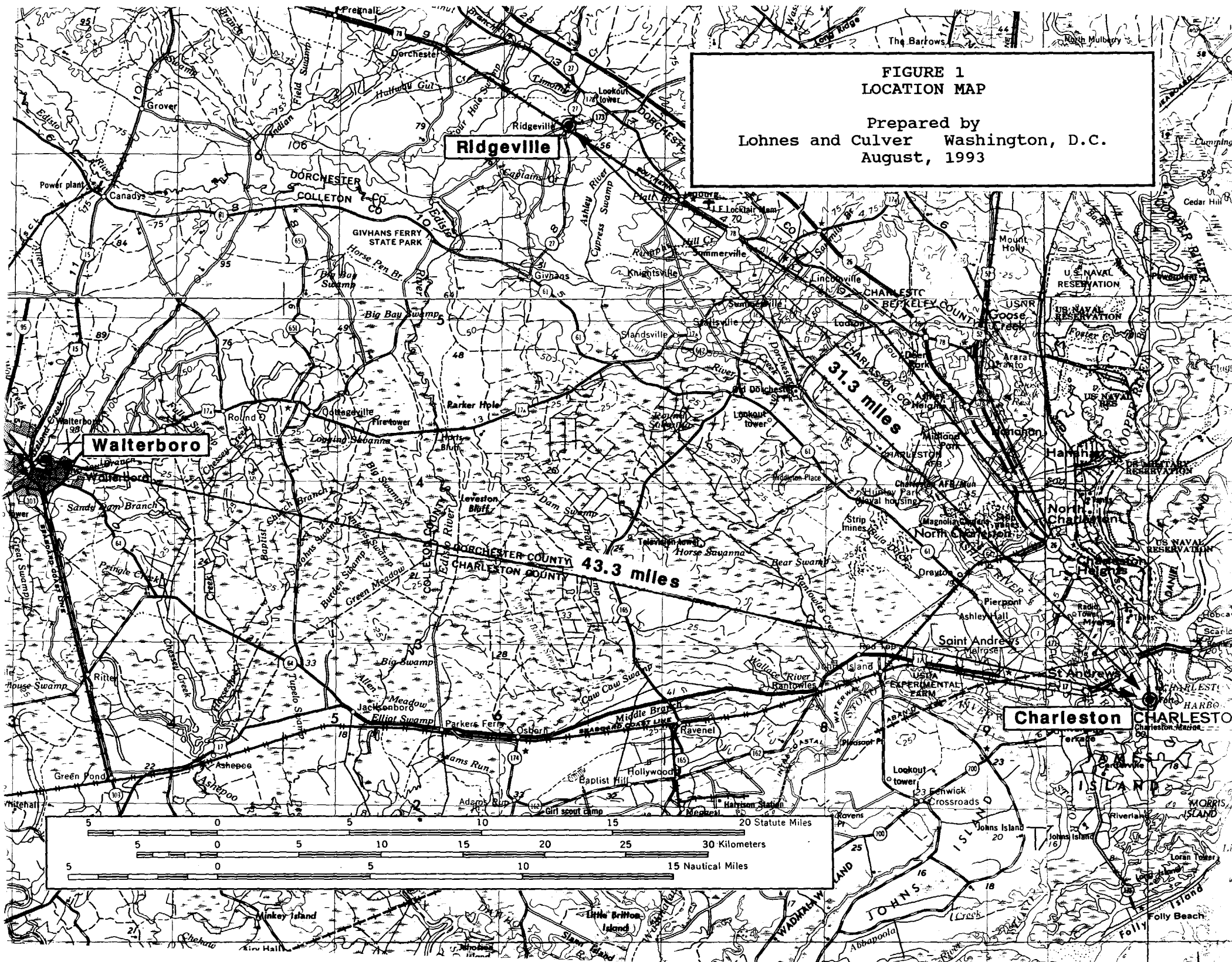
by


Frederick D. Veihmeyer

August, 1993

FIGURE 1
LOCATION MAP

Prepared by
Lohnes and Culver Washington, D.C.
August, 1993



G-12 SOUTH CAROLINA

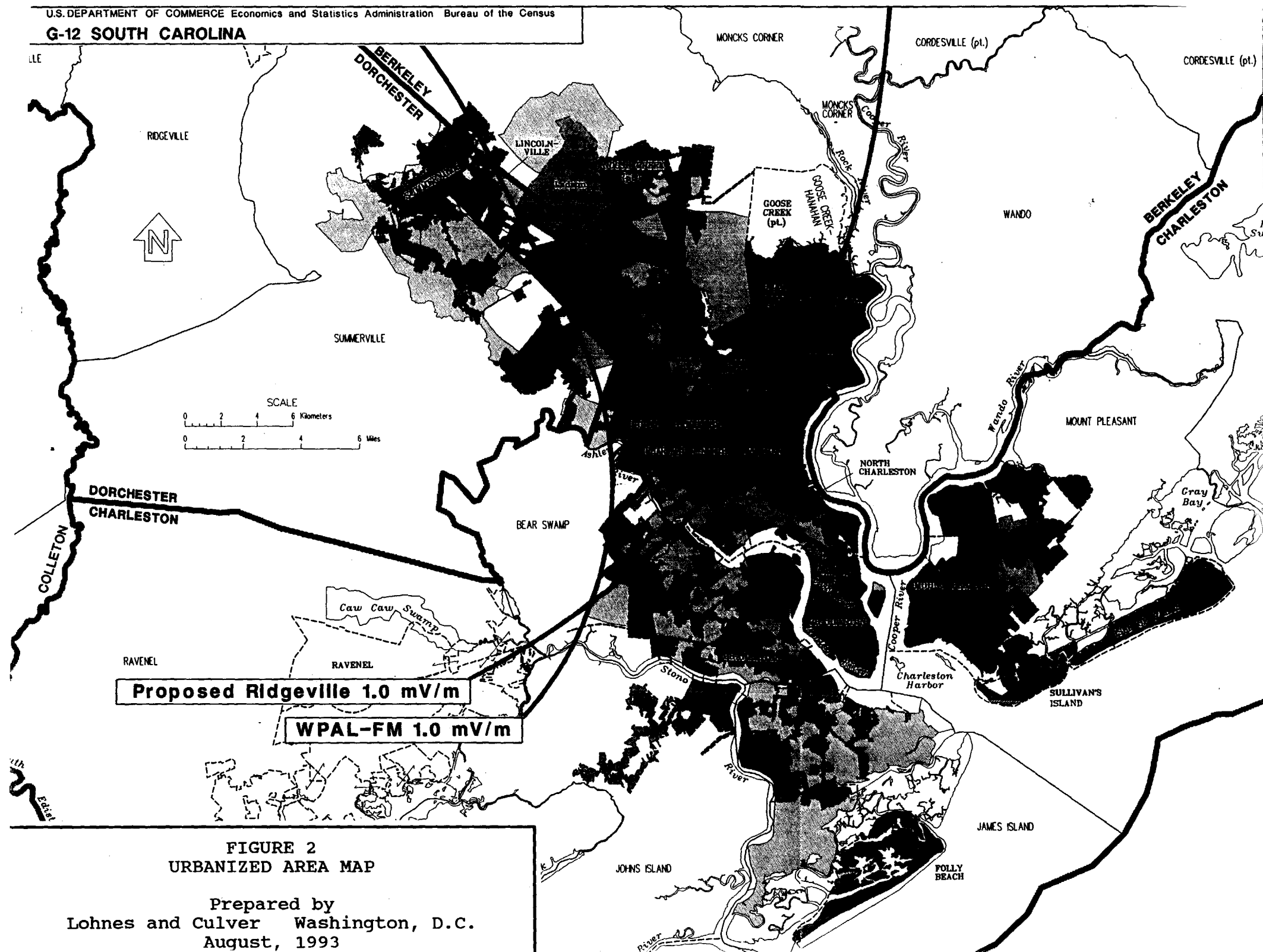


FIGURE 2
URBANIZED AREA MAP

Prepared by
Lohnes and Culver Washington, D.C.
August, 1993

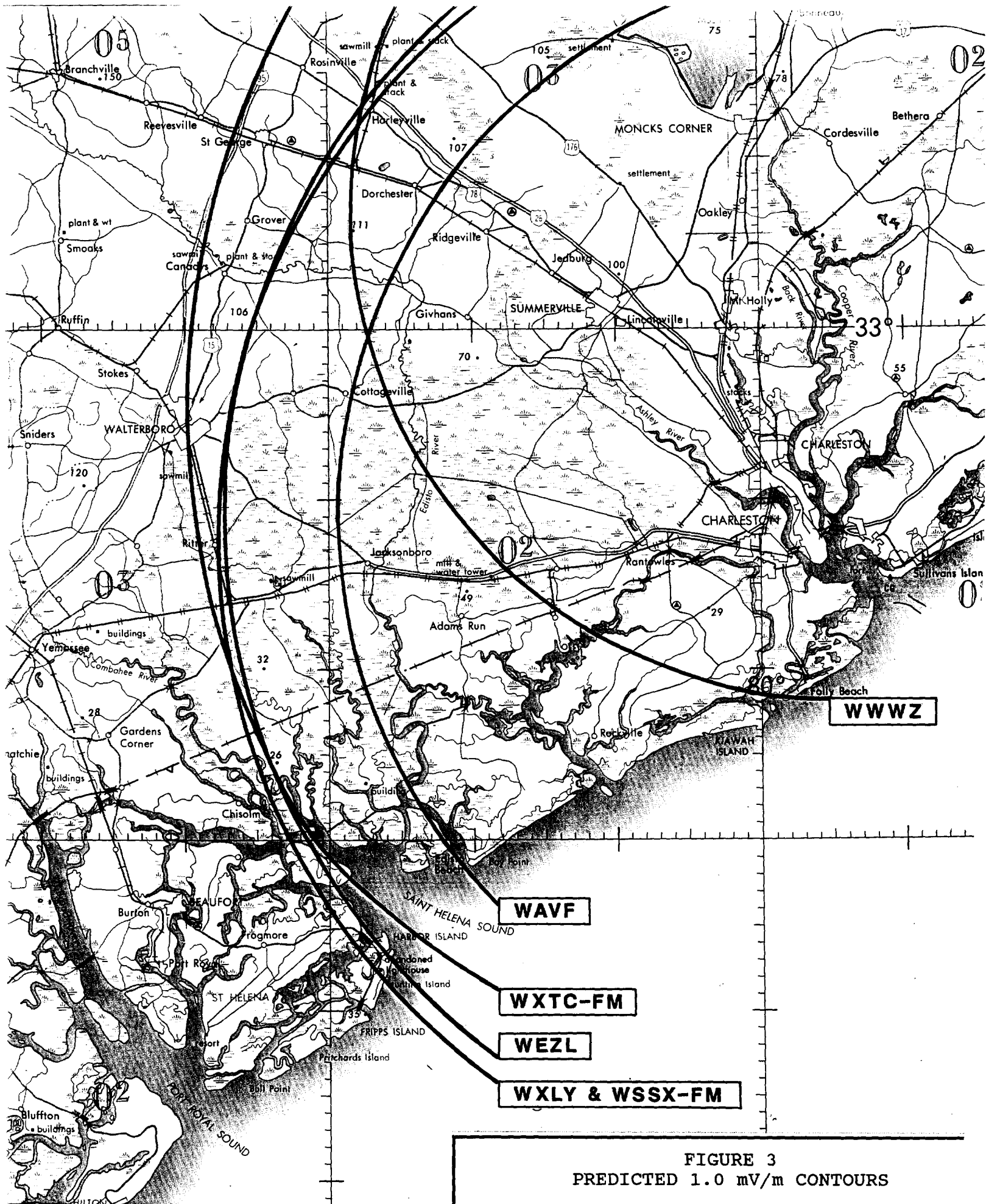


FIGURE 3
PREDICTED 1.0 mV/m CONTOURS

Prepared by
Lohnes and Culver Washington, D.C.
August, 1993

FIGURE 3A
FM STATIONS LOCATED WITHIN
CHARLESTON URBANIZED AREA
THAT PROVIDE 1.0 mV/m SERVICE
TO RIDGEVILLE AND/OR WALTERBORO

<u>STATION</u>	<u>LOCATION</u>	<u>ERP</u>	<u>HAAT</u>
WXTC-FM	Charleston, SC	100 kW	1768 Ft
WAVF	Hanahan, SC	100 kW	538 Ft
WEZL	Charleston, SC	100 kW	988 Ft
WSSX-FM	Charleston, SC	100 kW	1001 Ft
WXLY	N. Charleston, SC	100 kW	1001 Ft
WWWZ	Summerville, SC	50 kW	492 Ft

Prepared by
Lohnes and Culver Washington, DC
August, 1993

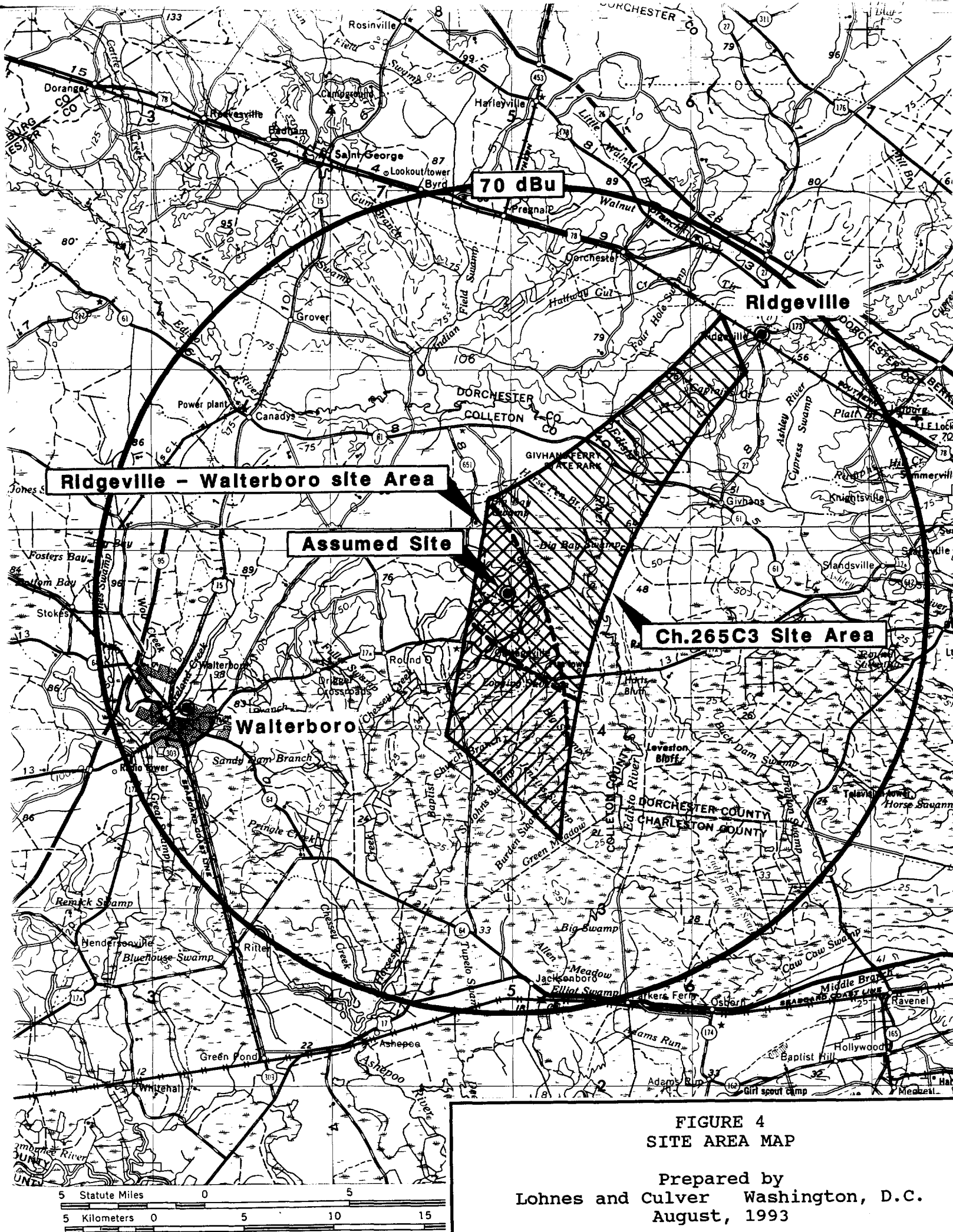


FIGURE 4
SITE AREA MAP

Prepared by
Lohnes and Culver Washington, D.C.
August, 1993

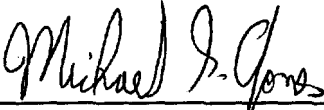
CERTIFICATE OF SERVICE

I, Michael G. Jones, attorney in the law offices of Irwin, Campbell & Crowe, hereby certify that true and complete copies of the foregoing "Comments in Opposition to Petition for Rulemaking" were served this 13th day of August, 1993, upon the parties listed below via first class mail, postage prepaid, or hand delivered, as indicated.

Michael C. Ruger*
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau
2025 M Street, N.W.
Rm 8322
Washington, D.C. 20554

William J. Pennington, III, Esq.
P.O. Box 2506
Pawleys Island, South Carolina 29585

*via hand delivery



Michael G. Jones